Supreme Court of the United States

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
ROSE HALVEY,

Petitioner,

vs.

JOHN F. HALVEY, Custodian of JOHN ARTHUR HALVEY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EMANUEL N. FRANKEL,
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Summary of Argument

POINT I.—The infant was not a party to the Florida proceedings; is not bound thereby, and the New York Courts could make such provision for his welfare as it deemed necessary.

POINT II.—Despite the Florida decree, the question of custody could be examined anew by the Courts of New York State, when the child came within the borders of the latter state.

POINT III.—The New York Courts did not deny full faith and credit to the Florida decree when they extended to the father the right of visitation and of access to his child.

Argument

The full faith and credit clause of the Constitution binds only parties to the litigation, and as to persons not parties thereto the clause has no application. In *Hansberry* v. *Lee*, 311 U. S. 32, this Court stated that the general rule is that in a case where one is not designated as a party or to which he has not been made a party by service of process, the judgment is not entitled to full faith and credit.

There are many cases in New York which hold that while a divorce decree of another State is binding upon the husband and the wife, it is not so as to the child. (*Matter of DeSaulles*, 101 Misc. 447; *People ex rel. Pickle* v. *Pickle*, 215 App. Div. 38; *Matter of Stewart*, 77 Misc. 524.) They proceed on the theory that the question is not so much the relative rights of the parents, as the rights of the children. Being minors they are unable to act for themselves and the Court, after an examination of the facts, determines what is best for them.

Judge Cardozo in *Finlay* v. *Finlay*, 240 New York 429, stated the attitude of the New York Courts as follows:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. • • •
>
> "The chancellor acts as parens patriae to do what is best for the interest of the child. • • • He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. He interferes for the protection of infants, *qua infants*, by virtue of the prerogative which belongs to the Crown as parens patriae."

The New York Courts have frequently asserted the doctrine that a decree of another State involving custody of infants does not diminish the prerogative of the New York Supreme Court, as successor to the Chancellor, to act as *parens patriae*. (*People ex rel. Herzog* v. *Morgan*, 287 N. Y. 317; *In re Bull*, 266 App. Div. 290, aff'd 291 N. Y. 892; *Young* v. *Roe*, 265 App. Div. 858, aff'd 290 N. Y. 293; *People ex rel. Allen* v. *Allen*, 105 N. Y. 628.) The Court decides, in the light of all the facts and circumstances, what is best for the interests of the infant. The foreign decree is taken into consideration as a fact or circumstance bearing upon the discretion to be exercised, but without dictating or controlling it (*People ex rel. Allen* v. *Allen, supra*).

The petitioner claims that there was no change of circumstances after the entry of the Florida decree to justify the Court in making a change of the custody provisions and therefore under the New York authorities, the decision of Judge Benvenga was incorrect. The case of *Ansorge* v. *Armour*, 267 N. Y. 492, cited by petitioner, is an action by an attorney who had represented a wife in habeas corpus proceedings for the custody of her child, to recover from the husband the reasonable value of his services. The custody question was therefore only indirectly involved. Other cases, however, have asserted the proposition that in the absence of a change of circumstances, the decree of the sister state should not be disturbed, and full faith and credit should be given thereto. But the very fact that a decree of another state may or may not be given faith and credit, depending on whether or not there is a change of circumstances, impairs the validity of the doctrine that custody provisions are entitled to full faith and credit. If those provisions are entitled to recognition, it would seem that they should continue to be so entitled, as long as those provisions

remain in the original decree. But undoubtedly, occasions arose when changes of conditions required prompt intervention by the Courts to guard the welfare of infants and so the theory of change of circumstances came into being.

In the last analysis, by a change of circumstances is meant that a new set of conditions has arisen that requires the Court to intervene for the protection of the infant. Yet there may be cases where, though strictly speaking there would be no change of circumstances, there would undoubtedly be intervention by the Court for the infant's protection. In the present case, the Florida Court was unaware of facts bearing on the mother's habits. Such lack of knowledge certainly should not bar a new examination of the facts in New York State, if it militated against the child's health and welfare. Suppose the parent who obtained the decree awarding custody was a homicidal maniac or afflicted with some disease which the child might contract if permitted to remain with the parent, and those facts were unknown to the Court granting the decree. Strictly speaking, if the custody question came up in another state immediately after the decree was obtained, there would be no change of circumstances. Yet there is no doubt that the Court would intervene and make such direction as would be necessary for the infant's best interests. The question should be therefore, not whether there is a change of circumstances, but what is essential to the welfare of the infant.

The present tendency of the New York Courts is to consider solely the interest of the infant, despite the foreign decree. (*In re Bull, supra; People ex rel. Herzog* v. *Morgan.*) Furthermore, the same tendency was noted by Mr. Justice Stone in his dissenting opinion, *Yarborough* v. *Yarborough*, 290 U. S. 202, footnote at page 223. He called attention to cases in many jurisdictions and other authorities on the proposition that conclusive force

is given to the determination of the state wherein the child resides, as long as that residence continues, but that upon a change of residence, the question will be open in the state to which the change is made.

Both *Davis* v. *Davis*, 305 U. S. 32, and *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226, cited by the petitioner, deal with the status of husband and wife and do not involve the specific question of custody.

Petitioner's brief (p. 11) states that it is not disputed that at the time of the entry of its decree, the Florida Court had control of the custody of the child. But as appears from the petition (p. 2) the child was not physically in the State of Florida on April 20, 1945, the date when the decree was entered. On April 19, 1945, the father took the child out of the State, in a peaceful manner, not as in *Pickle* v. *Pickle*, 215 App. Div. 38, where the parent who removed the child used force and violence.

Where the infant is not in the jurisdiction at the time of the decree awarding its custody the Florida Courts have held that such decree is not protected by the full faith and credit clause. (*State ex rel. Rasco* v. *Rasco*, 139 Fla. 349.) To the same effect is the District of Columbia case of *Seeley* v. *Seeley*, 30 App. D. C. 191, certiorari denied 209 U. S. 544.

The Florida decree does not prohibit the father's right of visitation and access. Such right of visitation and access should not be destroyed by that decree obtained *ex parte* and in all probability without a careful examination of the facts bearing upon the custody question. In the absence of a specific provision denying such right, the father is entitled thereto. (See opinion of Judge Benvenga and cases cited therein, R. 58). The details of the order and the power to order a bond were in the discretion of the Court making the same. See opinion of Judge Benvenga and cases cited therein (R. 59).

As the New York Court of Appeals said in *People ex rel. Herzog* v. *Morgan, supra*:

> "* * * The Special Term judge saw and heard the witnesses. He was face to face with the infants whose paramount interests were to be fostered. The facts that made his duty clear to him can at this distance be seen by us only, as it were, through a glass darkly. Our conclusion is that in all human probability the first-made findings of the Special Term are attested by the weight of the evidence."

CONCLUSION

It is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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